Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-578

IN THE

Supreme Court of the United States

October Term, 1987

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER THE BANK OF NOVA SCOTIA

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QUESTION PRESENTED

1. Is a district court authorized to dismiss an indictment pursuant to its inherent supervisory power, prior to trial, in order to protect the integrity of the grand jury process from and to deter willful, repeated, and pervasive misconduct by government attorneys?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Tenth Circuit were the United States of America, William A. Kilpatrick, Declan J. O'Donnell, Sheila C. Lerner, Michael J. Alberga, C.S. Gill, and The Bank of Nova Scotia. A listing of the parents, subsidiaries and affiliates of The Bank of Nova Scotia appears as Appendix E to the petition for writ of certiorari filed on behalf of The Bank of Nova Scotia.

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BRIEF FOR PETITIONER THE BANK OF NOVA SCOTIA

Opinions Below

The opinion (per Holloway, C. J. and Bohanon, J.[1]) and dissenting opinion (per Seymour, J.) of the United States Court of Appeals for the Tenth Circuit (A1-A41)[2] are reported as *United States* v. *Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987). The decision of the United States District Court for the District of Colorado is

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[1] The Honorable Luther L. Bohanon, United States District Judge for the Eastern, Northern and Western Districts of Oklahoma, sitting by designation.

[2] Citations to the appendix to the petition for the writ of certiorari filed on behalf of The Bank of Nova Scotia are denoted by an upper-case letter followed by the page number (*e.g.* "A10", "B14"). Citations to the Joint Appendix are denoted as "JA___." Citations to the original record are provided for material that has not been reproduced in the Joint Appendix: "K. Tr." references are to the transcripts of the hearings before the Honorable John L. Kane; "W. Tr." references are to the transcripts of the hearings conducted by the Honorable Fred E. Winner; "T. Tr." references are to the transcripts of Kilpatrick's obstruction trial; and "G.J. Tr." references are to the transcripts of the proceedings before the grand jury.

reported as *United States* v. *Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984) ("*Kilpatrick II*") (Kane, J.) (C1-C55) and a related decision of the district court is reported as *United States* v. *Kilpatrick*, 575 F. Supp. 325 (D. Colo. 1983) ("*Kilpatrick I*") (Winner, J.) (D1-D35).

Jurisdiction

The decision of a divided United States Court of Appeals for the Tenth Circuit was entered on June 18, 1987. That decision reversed the pretrial dismissal of an indictment against petitioner and others entered by the District Court of Colorado after hearings before the Honorable John L. Kane and the Honorable Fred M. Winner. Petitions for rehearing, with suggestions for rehearing *en banc*, were denied by divided votes on August 19, 1987. (B1-B3). The petition for a writ of certiorari was filed on October 8, 1987 and was granted on January 11, 1988, 108 S. Ct. 693 (1988). This Court has jurisdiction to review the judgments of the Court of Appeals under 28 U.S.C. § 1254(1) (1982).

Constitutional Provision And Rules Involved

This case involves the indictment by grand jury provision and due process clause of the Fifth Amendment to the United States Constitution and Rules 6(c), 6(d), and 6(e) of the Federal Rules of Criminal Procedure relating to grand juries, which collectively are reproduced in the appendix to The Bank of Nova Scotia's petition for a writ of certiorari at F1-F3.

Statement Of The Case

This case comes here for determination of the consequences of deliberate and repeated prosecutorial misconduct in the indicting process which was discovered and is being adjudicated prior to trial.

During every stage of the subject grand jury investigation, two prosecutors from the Tax Division of the Department of Justice, aided by IRS agents, who were illegally sworn by the prosecu-

tors as "agents of the grand jury," purposefully and systematically engaged in a course of conduct that violated virtually every rule established by this Court, Congress, and the Constitution designed to ensure fair and independent grand jury decisions. According to one witness, the stated purpose of one of the prosecutors for certain of the prosecutor's questionable conduct was that "even if the [target] wasn't guilty, the government would 'break him' with the cost of the defense." *Kilpatrick I* at D15. Motivated by their desire to "break" their prey, the prosecutors' numerous abuses deliberately were designed to usurp the grand jury's independence, to distort critical evidence presented, and to manipulate the vast powers of the grand jury to assemble evidence for subsequent use in civil tax assessments.

After seventeen days of hearings and meticulous review by two federal district court judges, including the judge who empanelled one of the two grand juries abused by the prosecutors, the district court found repeated, purposeful, and improperly motivated misconduct. The district court exercised its supervisory power and dismissed the indictment to protect the integrity of the grand jury system, to deter future lawlessness, and to ensure against the possibility of prejudice to the defendants. The district court concluded that the numerous purposeful abuses of the grand jury had "converted [it] into little more than a rubber stamp." *Kilpatrick II* at C53-C54.

The dismissal remedy employed by the district court pursuant to its supervisory power was the result of precisely the type of balancing required by this Court in *United States v. Hasting*, 461 U.S. 499 (1983). *See Dissenting Opinion* of Seymour, J. (A40-A41). Because the dismissal occurred before trial, the government was free to seek another indictment from a grand jury untainted by the abuse. It did not do so. Instead, although it conceded many of the acts of misconduct, the government appealed the dismissal contending that, regardless of the improper motives of the prosecutors and the pervasiveness of their misconduct, dismissal is never appropriate unless a defendant can actually demonstrate that he or she suffered prejudice due to the corruption of the grand jury process According to the government, in all other

situations a district court has no supervisory power to dismiss an indictment but must proceed to trial regardless of the nature and extent of prosecutors' deliberate misconduct before an indicting grand jury.

The unprecedented misconduct by the prosecutors here— which they tried to conceal, even after ordered to disclose, by suppressing the grand jury transcripts that revealed it— is detailed at length in the specific findings of two district court opinions. *United States v. Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984) ("*Kilpatrick II*") and *United States* v. *Kilpatrick*, 575 F. Supp. 325 (D. Colo. 1983) ("*Kilpatrick I*"). One commentator has cited the misconduct here as "illustrat[ive] [of] the extremes to which some prosecutors may go" and as a "comprehensive catalogue of prosecutorial misconduct before a grand jury." J. Lawless, *Prosecutorial Misconduct*, § 2.16 at 65, 67 (1985). With minor exceptions, all the district court's findings of misconduct were sustained on appeal.

A. District Court Proceedings

After an investigation conducted before two successive grand juries, a twenty-seven count indictment was filed on September 30, 1982 charging seven individuals and The Bank of Nova Scotia (the "Bank") with conspiracy, mail fraud, and tax fraud and also charging William A. Kilpatrick with obstruction of justice (Count 27). The indictment alleged illegality in connection with various tax shelters marketed by Kilpatrick and his company, United Financial Operations. Upon timely motion the district court, on February 21, 1983, dismissed the first twenty-six counts of the indictment for failure to charge a crime and as improperly pleaded. The court also dismissed the charges against the Bank upon the further ground that the indictment failed to allege that the Bank or any of its representatives had the requisite

knowledge and intent to commit the crimes charged. [3] The government appealed the dismissals. The one count not dismissed, the obstruction of justice count against Kilpatrick, was assigned for trial to Judge Winner. [4] *Kilpatrick II* at C1-C2.

On August 8, 1983, after briefing but prior to oral argument on the government's appeal, the Tenth Circuit entered an order partially remanding the case to the district court to enable all defendants to participate in the hearing then being conducted by Judge Winner in connection with defendant Kilpatrick's post-trial motions. The hearing was expanded to determine whether abuse of the grand jury process constituted an additional ground for dismissal of the entire indictment. *Kilpatrick II* at C2.

Before he could complete the hearing Judge Winner retired. Prior to his retirement, Judge Winner took enough evidence to determine that defendant Kilpatrick was entitled to a new trial. In determining that a new trial was required, Judge Winner reviewed numerous allegations of prosecutorial misconduct during trial by the same Department of Justice attorneys who had presented the case to the grand jury. *Kilpatrick I* at D24-D25, D30. The district court also found that the testimony of an important witness who appeared before both the petit and grand jury had to be re-evaluated in light of the revelation that the prosecutors had threatened to withdraw the informal letter grant of immunity he

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[3] Specifically, the district court found that although the other defendants were alleged to have been aware of the United States income tax consequences of the claimed scheme, the foreign Bank (at which certain banking transactions were conducted by the tax shelter promoter-defendants) and the Canadian manager of its Cayman branch, conspicuously were omitted from the otherwise exhaustive list of defendants who knew of the impact of the alleged banking transactions on United States income tax law. *See* note 11 *infra*.

[4] After a five day trial, the jury returned a verdict of guilty against Kilpatrick on the obstruction of justice count. Kilpatrick moved for a verdict of acquittal or, alternatively, a new trial. Kilpatrick's motion was based, *inter alia*, on prosecutorial misconduct during trial and in the grand jury. As a result of this motion, Judge Winner convened a hearing.

had received from them if he testified in a manner favorable to the defense. *Kilpatrick I* at D20-D21.

In addition to deciding the motion for a new trial, on August 25, 1983, Judge Winner issued a memorandum decision that summarized the status of the hearings being reassigned to Judge Kane. Because the evidence already developed in the hearings before Judge Winner supported the serious allegations of misconduct in connection with the grand jury presentation, Judge Winner undertook the unusual burden of an *in camera* review of the grand jury transcripts. The hearings and his *in camera* review of the transcripts revealed that, in their no holds barred effort to obtain an indictment, the prosecutors committed multiple violations of the rules applying to grand jury proceedings and deliberately endeavored to usurp the grand jury's function.

Judge Winner identified wholesale violations of grand jury secrecy, browbeating, intimidation, and manipulation of witnesses, and the illegal imposition of secrecy obligations on defendants' lawyers who appeared before the grand jury. Concluding that, in the language of Rule 6(e)(3)(C) and its advisory comments, a "preliminary factual showing of serious misconduct" had been made and that "grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," Judge Winner ordered that transcripts of all grand jury proceedings be made available to the defense. *Id.* at D27. [5] The prosecutors disobeyed this order and suppressed hundreds of pages of the transcripts revealing most of their misconduct.

[5] Angered by his criticism of their behavior, the government attorneys identified in Judge Winner's opinion, embarking upon "some bizzarre episodes of procedural novelty" (*Kilpatrick II* at C2), instituted a mandamus proceeding and obtained from the Court of Appeals a temporary restraining order prohibiting West Publishing Company from including Judge Winner's opinion in the bound volumes of the Federal Reporter series. The Tenth Circuit received wide national attention for its decision to restrain publication and subsequently lifted its unprecedented order and permitted publication. The Tenth Circuit has since reviewed and denied on the merits the prosecutors' mandamus petition. That opinion is reported as *Blondin* v. *Winner*, 822 F.2d 969 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 699 (1988).

These transcripts were turned over only after defense counsel's discovery of their suppression. *Kilpatrick II* at C2-C3. [6]

B. The District Court's Findings of Extensive Grand Jury Abuse

Judge Kane continued the misconduct hearings. He heard extensive testimony from the Department of Justice attorneys who presented the case to the grand jury, IRS agents, IRS personnel, and grand jury witnesses. He also reviewed thousands of pages of grand jury transcripts. At the conclusion of the hearings, Judge Kane made detailed factual findings concerning the misconduct committed, the prosecutors' motives, and the likely impact of the abuses upon the grand jury. [7] Judge Kane specifically found that the misconduct undermined the grand jury's independence, thereby prejudicing the defendants. He dismissed the indictment both on due process grounds and pursuant to his supervisory power. *Kilpatrick II* at C35, C51-C55.

The misconduct findings of Judge Kane were not disturbed by the majority of the panel of the Court of Appeals. Nor did the majority disturb Judge Kane's finding that the *purpose* of the misconduct was to usurp the grand jury's independence and to prejudice the defendants. What the majority disagreed with was Judge Kane's ultimate finding that the defendants were prejudiced by the purposeful misconduct. The majority reversed, holding that absent a showing of prejudice a district court cannot utilize its supervisory power to dismiss an indictment in order to uphold the integrity of the judicial system and to protect the independence of

[6] Still other grand jury transcripts were withheld until the government found them useful to it on appeal. *See* JA 12.

[7] For the first time on appeal the government asserted that prejudice could be determined by testimony from the grand jurors. Below, however, the government had successfully resisted a defense motion to interview the grand jurors. *See* Defendant Kilpatrick's Motion Authorizing the Interview of Grand Jurors, dated November 27, 1982. Among other reasons, the government asserted that the proposed interviews would be "cumbersome and would create substantial inhibition on the willingness of citizens to serve as grand jurors and, if they do, to deliberate freely." Government's Response to Motions of Defendant Kilpatrick: (1) For an Order Authorizing Interview of Grand Jurors (etc.) filed February 4, 1983.

the grand jury from deliberate prosecutorial misconduct and abuse designed to undermine it.

As is discussed in more detail below, Judge Kane found that during the course of the grand jury investigation the prosecutors:

(1) personally fashioned and administered unauthorized "oaths" in violation of Rule 6(c) to the IRS case agents to the non-existent office of "agents of a grand jury"; misdescribed to the grand jury that such an "oath" converted the IRS agents into agents answerable *only* to the grand jury, even though the agents testified at the misconduct hearings that they knew that their interests were aligned with, and they were working for, the prosecutors (*Kilpatrick II* at C3-C7);

(2) caused the same IRS agents at the conclusion of the investigation to "summarize" falsely the evidence supposedly presented to the grand jury against the Bank as a predicate for seeking its indictment (*Kilpatrick II* at C25-C31);

(3) in the presence of grand jurors, deliberately berated, intimidated, and mistreated a tax professor who had testified as an expert witness on behalf of the targets and who had contradicted the expert testimony of the government's expert that the tax shelters violated the tax laws (*Kilpatrick II* at C33-C34);

(4) abused their liberal practice of providing "informal immunity" to 23 grand jury witnesses by threatening to withdraw the immunity if the testimony did not please the government attorneys (*Kilpatrick II* at C20-C23);

(5) called seven different witnesses before the grand jury *solely* for the purpose of having the witnesses invoke their Fifth Amendment privilege, knowing the witnesses would do so, and to suggest falsely that certain of the targets were paying the witnesses' attorneys to assure that the witnesses stonewalled the grand jury (*Kilpatrick II* at C23-C25);

(6) repeatedly and purposefully violated Rule 6(d) by permitting their agent-witnesses to appear in tandem, without the government attorneys, to present evidence to the grand jury in largely unrecorded sessions (*Kilpatrick II* at C7-C8);

(7) improperly manipulated the grand jury investigation to gather evidence solely for use in civil audits, a *per se* violation of the grand jury process under *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 432 (1983) (*Kilpatrick II* at C12-C15);

(8) repeatedly and purposefully violated the secrecy provisions of Rule 6(e) by publicly identifying the targets and the subject matter of the grand jury investigation in letters to the targets' business associates and in dozens of interviews of investors in petitioners' tax shelter offerings in order to embarrass the targets and to hinder their business interests (*Kilpatrick II* at C15-C17); and

(9) for strategic purposes improperly imposed secrecy obligations in violation of Rule 6(e) upon grand jury witnesses who were attorneys that had formerly represented certain of the targets in connection with an SEC investigation of the tax shelters which were the focus of the grand jury investigation (*Kilpatrick II* at C18-C20).

1. Personal Administration of "Oaths" in Violation of Rule 6(c) to IRS Agents to the Non-existent Office of Agents of the Grand Jury in order to Mislead the Grand Jurors into Believing that the Prosecutors' Agents were Working for the Grand Jurors' Independent Interests

During the course of the two successive grand juries investigating this case, three IRS agents appeared before the grand juries at the instance of the prosecutors. The agents and the prosecutors recognized that the agents' true function was to assist the prosecutors in their goal of obtaining an indictment. However, this role was misrepresented to the grand jurors. The prosecutors, by inventing and administering their own oath and developing their own description of duties, expressly prejudged the credibility of the "agents" for the grand jurors by misleading the grand jurors into believing that the IRS agents were acting solely on behalf of the grand jurors' independent interests and had been converted into "agents of the grand jury."

Shortly after each grand jury involved in the instant investigation was sworn, the prosecutors devised their own oath and

swore Special Agents Raybin and Mendrop as "agents of the jury." [8] JA 91, 100-101, 110-111. After stating that he wanted to swear the agent as an "agent of the grand jury," the prosecutor furnished the grand jurors with the following job description:

> 'What an agent of the Grand Jury means is to *make very, very clear under the law* that when he interviews people and he looks at this stuff, he is *not* looking at it so much as a special agent of the Criminal Investigation Division of the IRS, but *he is looking at it as your agent and he is answerable to you* and he is answerable to Rule 6. Do you recall Rule 6, the Grand Jury Secrecy?'
>
> *'What it is, is very, very plain, and it states in what capacity he is operating in this investigation so there is no question about it.'*

JA 100 (emphasis supplied).

Additionally, several months after the institution of the second grand jury, Schneider, an IRS agent assigned to the civil division and whom the prosecutors ultimately relied upon as an expert, was sworn in as an additional "agent of the grand jury." [9] The government has conceded that the prosecutors possessed no authority to administer such oaths.[10] Indeed, during the misconduct hearings, the prosecutor who administered the oaths acknowledged that he cavalierly created the oath without a basis to

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[8] In his decision, Judge Kane made clear that mere mislabeling was not his concern:

> The government argues that this event should be viewed as a technical mislabeling of no great import. It is, however, more than a misnomer.

Kilpatrick II at C4.

[9] The prosecutor compounded the problem when he erroneously informed the grand jury that, as an IRS expert, the agent could be relied upon as a witness with no bias or interest in the investigation. JA 166-167.

[10] Such a concession of course was unavoidable. Rule 6(c) specifically provides that only "[t]he foreperson shall have power to administer oaths . . . . "

do so and was simply "shooting from the hip." *Kilpatrick II* at C2-C3; JA 57, 59.

As the district court found, the grand jurors were consistently reminded of the agents' uniquely created and described role and urged to rely upon the IRS special agents as their "agents." Thus, virtually every time Raybin and Mendrop appeared as witnesses before the grand jury, the government attorney reiterated that they were appearing as "agents of the grand jury." *Kilpatrick II* at C4-C5.

Contrary to the IRS agents' fiduciary role depicted by the prosecutors to the grand jury, the district court found that the prosecutors and the agents were well aware that the agents *did not* conduct their investigation as agents of an independent, unbiased grand jury. They were agents of the Department of Justice and the Internal Revenue Service, not the grand jury. *See Kilpatrick II* at C5-C6; K. Tr. 232, 401-402. Although the government attorneys were quick to inform the grand jury of the prosecutors' role as advocates, the grand jurors were never informed that their witnesses in the guise of "agents of the grand jury" were "primarily" representing the same interests as the Department of Justice attorneys and, therefore, were also advocates for an indictment.

The prosecutors used the agents, whom the grand jurors were supposed to believe were representing the grand jury's independent interests, to do more than assist the prosecutors in the investigation. They used them to testify about disputed facts on numerous occasions as well as to outline the investigation at the commencement of the grand jury proceeding and to summarize the evidence for the grand jury at the conclusion of its proceedings, as a predicate to the prosecution's request for an indictment. *Kilpatrick II* at C6-C8. For example, on the first day that the second grand jury convened, Agent Raybin summarized the background of the investigation, explained tax shelters to the jury, and testified that the circular financing utilized in the tax shelters under investigation was illegal. *Id.* at C6-C7. Agent Schneider appeared as the expert in the field of tax shelters to summarize the government's legal theory. *Id.* at C7.

The prosecutor's misdescription of the agents' roles to the grand jury necessarily affected the grand jurors' evaluation of their testimony and the agents' role in the investigation. Thus, the jurors were deprived of making an independent evaluation of the IRS agents' extensive testimony since they lacked the understanding that the agents, like the prosecutors, were advocates for an indictment for alleged IRS violations. This was especially damaging to the Bank because it was through one of these agents that false summaries of the evidence against the Bank were submitted to the grand jury. *Kilpatrick II* at C4-C7.

2. False "Summaries" of "Evidence"

Although the grand jury investigation lasted approximately twenty months, the district court found that the case against the Bank was presented on a single day—the day before the indictment was returned. Prior to that time, the grand jury's focus throughout its proceeding had been on the tax shelter promoters. The purported "evidence" against the Bank consisted almost entirely of a false "summary" presented by a purported "agent of the grand jury" that was apparently intended to convince the grand jurors—who had discussed whether the foreign Bank and its employee had the requisite knowledge and intent—that the Bank should be indicted. *Kilpatrick II* at C25-C27.[11]

In response to the grand jurors' inquiries as to why the Bank was being singled out for prosecution when other institutions where similar banking transactions had taken place were not, the prosecutor suggested that The Bank of Nova Scotia was a more appropriate target because it was a large internationally known

[11] Ironically, when the indictment was returned, the Bank and its representative were conspicuously omitted from the list of defendants who were alleged to have had knowledge of the United States income tax object of the alleged scheme. *See Kilpatrick II* at C2. Thus, although the indictment alleged that the Bank and its representative Smith knew there were insufficient funds to support the transfers of certain checks among various companies that maintained accounts at the Bank, it omitted the Bank and Smith from the list of those who allegedly realized there were United States income tax consequences of this. In the words of the indictment:

Footnote continued on the next page

bank. JA 183-185. He went on to suggest falsely that the "evidence" indicated that the Bank's representatives were familiar with Kilpatrick's business operations and were aware that the IRS would be defrauded by the banking activity. JA 178-179, 185; *Kilpatrick II* at C26.

To support his groundless assertions, the prosecutor introduced one of the "agents of the grand jury" as a person who would "summarize" and "just walk through [the evidence], *one more time*, and refresh your memory." JA 176; *Kilpatrick II* at C26 (emphasis supplied). With regard to "the *evidence* pertaining to The Bank of Nova Scotia," however, the agent's testimony was not a summary of evidence previously introduced before the grand jury but, instead, was an unsupported account of misinformation. *Id.* (emphasis supplied). Even more importantly, certain significant alleged evidence—supposedly "summarized"—was known by the government to be false.

The district court found that the purportedly summarized testimony was that of three witnesses: Messrs. Waters, Ros, and Charles. Waters had never appeared before either grand jury. The other two witnesses testified to the first grand jury, not to the indicting grand jury. The latter supposedly heard the testimony of Ros and Charles when read to the second grand jury in the dubious transcript reading sessions discussed below.[12] *Kilpatrick II* at C26-C28.

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> D(2). . . WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL, JOHN PETTINGILL, SHEILA C. LERNER, *C.M. SMITH* and *THE BANK OF NOVA SCOTIA*, knew that this type of "check kite" was fictitious, and was conducted to create checks to make it appear that P&J Coal Company had made its required loans. *WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL, SHEILA C. LERNER, JOHN PETTINGILL knew that investors would take substantial deductions on their federal income tax returns which were fictitious, false, and fraudulent,* as the transactions in issue were nothing more than a "check kite" and/or "check swap".
>
> Indictment Count I "Means and Methods," Paragraph D2 (emphasis supplied).

[12] *See* pp. 20-21 *infra.*

With respect to the "evidence" that the grand jury had purportedly already received from Waters, the IRS agent testified that Waters said he had met Monte Smith in Mr. Kilpatrick's offices in Denver.[13] This was the only "evidence" of any kind that any Bank representative ever met Kilpatrick in the United States or dealt with him outside the Cayman branch office of the Bank.

Regarding the agent's purported "summary" concerning this supposed Denver visit, the district court found that at the time the agent testified about it in the grand jury, the prosecutors knew it was *probably not true* because Waters' description of the person he met did not match that of Monte Smith. Indeed, the prosecutor admitted in the misconduct hearings that "[t]here was a real question as to whether or not it was the same person." (JA 87). In spite of this "real question," the agent was permitted to misrepresent to the grand jury that there was "considerable confirmation that Mr. Smith had actually come out here and visit[ed] with Mr. Kilpatrick." (JA 190).

The district court found that the remainder of the agent's summary as it related to the Bank was equally dubious. Indeed, the district court found that the supposed "summary" by the agent attributed to the testimony of Messrs. Ros and Charles several statements inculpatory of the Bank that were not found in the transcripts supposedly read to the grand jurors and which in some instances actually are contradicted by those transcripts. *Kilpatrick II* at C29-C30.

Moreover, the district court found that the agent was not alone in attempting to mislead the grand jurors as to the critical question of the Bank's knowledge and intent. Immediately prior to the agents' false summary the prosecutor asserted:

> [A]s my agents will tell you there is evidence that the Bank knew it was the IRS -- *they were in fact told that it was the IRS they were defrauding.*

---

[13] Defendant, Monte Smith, by whose actions the Bank is alleged to be vicariously liable, was the manager of its Cayman Island branch. *Kilpatrick II* at C28.

JA 178-179 (emphasis supplied). No evidence was presented to support that "fact," even in the agents' misleading summary. *Kilpatrick II* at C30-C31.

3. Deliberate Berating and Mistreatment of Witness Favorable to the Defense

The indictment herein questions the legality of several tax shelters developed by Kilpatrick and his associates and, in particular, the method of financing utilized to support deductions by investor-taxpayers. Thus, the targets' understanding of the propriety of the financing structure was central to the prosecutors' efforts to obtain an indictment.

On the recommendation of a professor of tax law at the University of Michigan, defense counsel employed Professor Roland Hjorth of the University of Washington Law School, a recognized tax expert, to testify as an expert before the grand jury. The district court found that in his unbridled zeal to obtain an indictment the prosecutor's treatment of Professor Hjorth differed markedly from the treatment the prosecutor afforded his own expert "agent of the grand jury," who the prosecutor had told the grand jury was impartial. JA 166-167. Judge Kane, citing Judge Winner's analysis, aptly summarized this behavior:

> [Professor Hjorth's] views of tax law differed markedly from those of [the prosecutor], who bragged on frequent occasions that he had never taken a course in taxation and knew almost nothing about it. Nevertheless, Professor Hjorth was browbeaten and ridiculed by [the prosecutor], and some of the conversation so out of place for an ethical prosecutor took place *during a recess in the hearing of some grand jurors.*

575 F. Supp. at 333.

Indeed, the prosecutor's heated argument with Professor Hjorth was also overheard by witnesses scheduled to appear before the grand jury. W. Tr. 334. Moreover, the conduct was so shocking that Richard

Slivka, a local attorney formerly employed by the Department of Justice and Colorado United States Attorney's Office, who was representing witnesses scheduled to appear and who himself observed the conduct, wrote a letter to Chief Judge Finesilver shortly thereafter reporting the incident. W. Tr. 317-27; 350-64. Professor Hjorth testified that the prosecutor's conduct was so abusive that he would never again appear as an expert witness in a similar proceeding.

Judge Winner concluded of the prosecutor's conduct that:

> Intimidating witnesses by telling them that their testimony disgraces them and implying that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington Law School because an expert testified to his expert opinions does no credit to our government . . . [s]eemingly, the professor's testimony isn't seriously contested. I hope that we haven't gotten to the point that disagreement with the legal concepts of the IRS provides grounds for attacks by that bureaucracy because sometimes the IRS is wrong.
>
> *U.S.* v. *Sells Engineering*, ___ U.S. ___, 103 S.Ct. 3133, 77 L.Ed.2d 743 and *U.S.* v. *Baggot*, _ U.S. __, 103 S.Ct. 3164, 77 L.Ed.2d 785.

575 F. Supp. at 333; *see also* K. Tr., 502-505.

Kilpatrick II at C33-C34 (emphasis supplied).

The government never disputed or offered any legitimate reason for the prosecutor's outrageous behavior other than to simply conclude that it was "poor judgment." *Kilpatrick I* at D16. The majority of the Tenth Circuit commented that the prosecutor's behavior was "unjustifiable." Majority Op. at A27.

4. Manipulation of Informal Grants of Immunity to Ensure Evidence Favorable to the Prosecutor

During the grand jury presentation, no witness was given immunity as authorized by Congress. *See* 18 U.S.C. §§ 6002-6003. Instead, twenty-three witnesses were issued "letters of assurance" by the prosecutors and testified under this so-called "informal immunity." At the hearings, the prosecutors acknowledged that, in their quest to obtain evidence against the tax shelter defendants, they ignored the federal immunity statute and "liberally" distributed these "letters of assurance" in order to by-pass the review procedure established by Congress. *Kilpatrick II* at C21. Regardless of the legal propriety of the prosecutors' method of issuing immunity, [14] the district court determined that the manner in which the informal immunity was manipulated by the prosecutors here injected serious ambiguity into the grand jurors' assessment of the testimony received. *Kilpatrick II* at C22-C23.

The precise implications of the informal immunity was never made clear to the grand jury. Indeed, the two prosecutors gave the grand jury directly contradictory explanations of the effect of the "letters of assurance." One told the grand jurors that a witness who received a letter had immunity and could not invoke his Fifth Amendment privilege; the other told the grand jurors that the witness retained his privilege and could still refuse to testify. *Kilpatrick II* at C22.

The district court also found that the prosecutors misused the letters of assurance to enable them to be certain that at least one important witness, Richard Bell (one of the few witnesses who dealt with the Bank), would not testify favorably to the defendants. Richard Bell's brother, who acted as his attorney, was told by one of the prosecutors prior to Richard Bell's grand jury appearance that if Richard Bell testified for the defense "all bets

[14] Citing *United States* v. *Doe*, 465 U.S. 605 (1984) and *Pillsbury Co.* v. *Conboy*, 459 U.S. 248 (1983), the district court held that repeatedly bypassing the congressionally authorized procedure itself was improper. *Kilpatrick II* at C44-C45. The majority of the Tenth Circuit panel disagreed. Majority Op. at A22. The majority, however, did not dispute that the prosecutors improperly manipulated witnesses by the manner in which they handled the "letters of assurance."

were off." (T. Tr. 456-480; 495-96). Richard Bell understood this admonition to mean that he could lose the protection of the "letter of assurance" and could be prosecuted if he testified favorably to the defense. *Kilpatrick II* at C23.

In granting Kilpatrick's motion for a new trial, Judge Winner, who observed Richard Bell's testimony and demeanor during the related obstruction trial of Kilpatrick, determined that this threat to Bell would have affected the petit jury's credibility assessment of Richard Bell. *Kilpatrick I* at D20-D21, D29. It must likewise be concluded that knowledge of this threat would have affected the grand jury's evaluation of Richard Bell's testimony. [15]

5. Requiring Seven Witnesses to Testify Before the Grand Jury Solely for the Purpose of Falsely Suggesting that their Assertion of the Fifth Amendment Privilege was being Financed by the Targets

In February and March 1982, the prosecutors decided to parade seven witnesses before the grand jury knowing they would invoke their Fifth Amendment privilege. Each was asked an essentially uniform question:

> [I]f I would ask you any questions concerning any relationship you may or may not have had with William A. Kilpatrick, John Peddingill [sic], Sheila Lerner or Declan J. O'Donnell or United Financial Operations, would you assert your right against self-incrimination on those questions?

JA 153-154, *see also* JA 140-143, 149-151, 153-154, 158.

The district court found that the purpose of this activity was "to prejudice the grand jurors against the targets and the tax shelter transactions under investigation, and not to lay a statutory predicate for immunizing the witnesses." *Kilpatrick II* at C24. In-

[15] The mischief, of course, lay in making it appear to the witness that immunity was contingent on the witness's presentation of testimony detrimental to the accused. To characterize that violation as motivated by "improper strategic motives" is probably euphemistic. The prosecutor sought to purchase testimony and was willing to cancel the sale if the testimony was not going to be what he wanted.

deed, as the district court determined, in some instances the prosecutor asked additional questions to elicit that Kilpatrick's company was paying the witnesses attorneys' fees, "leaving the grand jury with the impression that their refusal to testify was being financed by the targets." *Ibid.*

The district court also observed that the grand jury transcripts revealed that the prosecutor was acutely aware of the strong possibility of prejudice from his purposeful conduct:

> That the prosecutor's conduct in this regard (which occurred before the second of the two grand juries empanelled in connection with this investigation) was known to him to be improper and prejudicial is revealed by his statements to the first grand jury several months earlier:
>
> > Immediately all the witnesses I had subpoenaed today decided that they would not want to come in here and testify and they said they would assert their Fifth Amendment rights.
> >
> > I could force them in here under their Fifth Amendment rights, but under the Department of Justice guidelines *I should not do that except in exceptional circumstances should I bring a person in here and have them assert their Fifth Amendment rights because it serves no purpose and it only serves to prejudice, and it can prejudice a layman.*

G.J. Tr. Remarks of Prosecutor, February 2, 1981, 9:40 a.m. at pp. 2-3 (JA 92) (emphasis supplied). Indeed, the prosecutor did to the second grand jury precisely what he told the first grand jury he could not and should not do. The only difference is that, when he did it anyway, he did not tell the grand jurors that he was doing it to them. General instructions, months prior, that jurors not draw inferences from an individual's invocation of the privilege against self-incrimination cannot correct such corruptions of the grand jury process. G.J. Tr. Re-

marks of Prosecutor, July 8, 1981, 10:50 a.m., at p. 6; January 5, 1982, 9:09 a.m., at pp. 22-23.

Kilpatrick II at C24-C25.

The government has never argued that any "exceptional circumstances" arose requiring these prosecutors to call any of these seven witnesses to invoke their privilege. Their motive was to prejudice the targets.

6. Repeated and Purposeful Violations of Rule 6(d)—One Witness Rule

The investigation resulting in the instant indictment spanned two successive grand juries. The manner in which evidence before the first grand jury was transmitted to the second grand jury was symptomatic of both the prosecutors' cavalier attitude towards grand jury rules of procedure and their abdication of the prosecutors' responsibility before the grand jury.

In direct contravention of Rule 6(d), pairs of IRS agents were permitted to make numerous unsupervised forays into the grand jury in order to read transcripts from the prior grand jury to the grand jurors who returned the indictment.[16] The illegal practice occurred over a period of several months and involved at least four IRS agents. *Kilpatrick II* at C7-C8. During the misconduct hearings the prosecutors revealed that they "really [were not] concerned" about violating the rule (JA 57) and initially had undertaken the unauthorized practice as an accommodation to two of the agents who complained of "colds and sore throats or something" on a day when the prosecutors desired to have transcripts read. (JA 53). No valid explanation was offered as to why the illegal practice was repeated on numerous occasions thereafter or why the agents, who at least in some instances had never been ad-

[16] The government has conceded that Rule 6(d) was violated by these repeated unique sessions. *See* Gov't Response to Defendant's Opening Brief in Support of Motions to Dismiss, filed November 14, 1983 at p. 4; Gov't Response to the Bank's Proposed Findings of Fact and Conclusions of Law, filed April 9, 1984 at p. 15.

ministered an oath, were left unsupervised as the prosecutors absented themselves from the proceedings.[17] JA 160-161.

The transcripts do not reveal whether the unsupervised agents in control of the proceedings summarized, disregarded, or omitted evidence, or if they commented by word or conduct improperly on the testimony being read.[18] Clearly, the prosecutors abdicated their responsibility of supervising the grand jury in a manner to ensure fairness.

7. Improper Manipulation of Grand Jury Investigation to Gather Evidence for Use in Civil Audits

The district court determined that during the course of the grand jury investigation the government representatives systematically disregarded the strictures of Rule 6(e).[19] Grand jury material was widely disseminated to IRS personnel who controlled, or failed to control, its disclosure and analysis without appropriate orders. Moreover, in direct violation of Rule 6(e), many individuals with access to grand jury material were never identified. Most importantly, however, the vast powers of the grand jury were utilized to assemble volumes of information that were never presented to the grand jurors but, instead, were gathered for later civil use. *Kilpatrick II* at C9-C15.

[17] The prosecutors' absence was particularly irresponsible in light of the fact that the agents, who were not bound by the same ethical code as government attorneys (*see Berger* v. *United States*, 295 U.S. 78 (1935)), felt themselves aligned with the prosecutors' role as active advocates of an indictment. *See supra* at 11. The prosecutors' apparent reason for absenting themselves was that they found the process "boring". *See* G.J. Tr. Remarks, May 6, 1982, 12:08 p.m. at 3.

[18] The precise impact of these unsupervised tandem reading sessions is impossible to assess. The grand jury transcripts, aside from the introductory remarks, refer only to the name of the witness whose testimony was supposed to have been read. As the district court determined, the matters that were supposed to have been covered during these improper sessions were of "considerable substance." *Kilpatrick II* at C36.

[19] Although the majority of the Tenth Circuit held that the return of an indictment demonstrates that the grand jury was not abused for *solely* civil purposes, it did not dispute the numerous underlying violations of Rule 6(e) identified by the district court.

Richard Gullion, a civil IRS agent assigned to the examination division in Denver, acknowledged that the IRS hoped to take advantage of the fruits of the grand jury investigation at the conclusion of the criminal proceedings. *Kilpatrick II* at C12. As a result of this institutional intent, the district court found that the grand jury's extraordinary powers at least in part were manipulated to obtain evidence for eventual civil use by the IRS in direct contravention to the important policy considerations identified by this Court in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), and its progeny.

During the course of the grand jury investigation, eight IRS agents, teamed in pairs, went to four cities and interviewed between forty and sixty tax shelter investors selected primarily from investor lists obtained by grand jury subpoenas. Special Agents Raybin and Mendrop prepared a questionnaire to be completed by the interviewees, and the agents also prepared summaries of the interviews. To facilitate the questioning, the agents identified themselves as IRS agents assisting the grand jury and informed reluctant investors that, unless they agreed to be interviewed by the agents, they would be subpoenaed to the grand jury. As Judge Kane found, *none* of these investors was called to the grand jury; *none* of the interview summaries was presented to the grand jury; and *none* of the investor-completed questionnaires was presented to the grand jury. *Kilpatrick II* at C12-C14.

No explanation by the prosecutors or agents was ever offered below as to why none of this evidence was presented to the grand jury. Using subpoenaed investor lists, the IRS agents identified and obtained the investors' returns. The returns were never presented to the grand jury but were conveniently centralized in file cabinets at IRS offices. (JA 25). The agents then recruited several civil tax auditors to recompute the tax due and owing on the returns, disallowing the deductions for the tax shelters. (JA 24-26). Although the agents testified that they undertook this program to compute harm to the government, they could not explain why the results were never presented to the grand jury during the course of the twenty month investigation—only the prosecutors could. (JA

27). Although given ample opportunity at the hearings, the prosecutors never did. *Kilpatrick II* at C14.

8. Public Identification of Targets for Purposes of Embarrassing Targets and Hindering their Business Relationships

The district court found that the prosecutors blatantly disregarded the historical and Congressionally imposed secrecy strictures of the grand jury in order to embarrass targets and to interfere with their ongoing business operations during the course of the investigation. *Kilpatrick II* at C15. The names of the targets and the nature of the investigation were widely publicized.

The district court found that the illegal disclosures were particularly egregious because the recipients of the information were known customers and business associates of the targets. In particular, the district court observed that the following form letter, signed by the so-called agents of the grand jury but sent on United States Attorney letterhead was sent to individuals, beyond the court's subpoena power, with whom the targets had known business and professional relationships. The text of the letter read in part as follows:

> The *United States Department of Justice is conducting a Grand Jury investigation of the business activities of William A. Kilpatrick, Declan J. O'Donnell, John Pettingill and Sheila C. Lerner* for the years 1977 through 1980. The Grand Jury is attempting to determine whether these individuals, through United Financial Operations, Inc., P & J Coal Company, Inc., Marlborough Investments, Ltd., International Fuel Development Corp., Ltd., and International Block Construction Company, Ltd., have committed violations of Title 18 and Title 26 of the United States Code.
>
> *The Grand Jury has obtained information which indicates that you have had and/or currently do have a business relationship with one or more of the individuals and/or entities listed above.* It has been determined that your testimony will be helpful in resolving questions which still face the Grand Jury. Subsequently, the United States Department of Justice cordially invites you to appear and testify before the Federal Grand Jury

in Denver, Colorado (U.S.A.) at your convenience. Transportation, lodging and meals will be arranged for and paid by the United States Department of Justice.

• • • • • •

We look forward to your response,

Sincerely yours,

STEPHEN L. SNYDER
Trial Attorney
Criminal Section
Tax Division

By: PAUL E. RAYBIN
Special Agent

Similar information was conveyed orally to numerous tax shelter investors. *Kilpatrick II* at C15-C17.

9. Illegal Imposition of Secrecy Obligations on Targets' Lawyers in Order to Gain a Tactical Advantage

Two attorneys who represented some of the targets in related SEC proceedings were called as witnesses before the indicting grand jury. Displaying a view of the sanctity of the attorney-client privilege only matched by their regard for the rules of the grand jury, the prosecutors explained the purpose of these subpoenas to the grand jurors as follows:

> [W]e want to know what the lawyers were told by the principals, and what information they relayed to other parties. (JA 128).

In direct contravention of Rule 6(e)(2) Fed. R. Crim. P., [20] and for what the record reveals was an improper strategic

[20] Rule 6(e)(2) provides in pertinent part:

> (2) *General Rule of Secrecy*. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure

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purpose, both witnesses, and only these two attorney-witnesses, were sworn to secrecy:

> Q: You are also aware that the proceedings of this Grand Jury are secret and that is covered by Rule 6 of the Federal Rules of Criminal Procedure, that is, any questions I put to you today, questions that the Grand Jury may have, any discussion we have in this room at your appearance, that your appearance should be kept secret by you; do you understand that?
>
> A: Yes, sir, I do.

JA 132-134; *see also* JA 134-136. The district court found that "the government imposed the unauthorized secrecy obligations upon these two witnesses to prevent defendants from determining the nature and extent of any communication that might have been revealed and to foreclose a challenge to such testimony based upon an applicable privilege." *Kilpatrick II* at C19; *see In re Grand Jury Investigation of Hugle*, 754 F.2d 863 (9th Cir. 1985).

C. District Court's Conclusions

The district court rejected the prosecutors' repeated insistence that the challenge to their misconduct was "silly" and "frivolous," noting instead that when viewed in combination the conduct amounted to a "travesty" and resulted in an "investigation out of control and a grand jury which was converted into little more than a rubber stamp." *Kilpatrick II* at C53-C54. Judge Kane concluded that this pervasive and systematic abuse of the grand jury process required dismissal of the indictment because (i) it was "flagrant to the point that there [was] some significant in-

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> is made under paragraph (3) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. *No obligation of secrecy may be imposed on any person except in accordance with this rule* . . . .

(Emphasis supplied).

fringement on the grand jury's ability to exercise independent judgment," and (ii) it was necessary to protect the integrity of the judicial process and insure proper standards of conduct by prosecutors. *Kilpatrick II* at C51-C55.

Judge Kane's dismissal was carefully tailored to purge the taint resulting from the extensive misconduct without infringing on society's right to enforcement of its laws. Thus, it did not bar the government from attempting to seek an untainted indictment.

D. The Court of Appeals Decision

Instead of seeking an untainted indictment, the government appealed Judge Kane's dismissal. Writing for the majority, Judge Holloway reversed the decision below, after a *de novo* review of the evidence, concluding that the violations and misconduct, although admitted or proven (A16), did not significantly infringe the grand jury's ability to exercise independent judgment. Despite the fact that certain of the misconduct was in its words "unjustifiable," (A27) absent significant infringement, the majority held, Judge Kane had no authority to exercise supervisory power to dismiss an indictment to protect the integrity of the judicial process. The majority did not address the issue of the overwhelming "possibility" of prejudice (*Young* v. *United States*, _U.S._, 107 S. Ct. 2124, 2139 (1987)) presented by the prosecutorial abuse, nor did it dispute Judge Kane's determination that the prosecutors were motivated to prejudice the targets.

The Honorable Stephanie K. Seymour dissented, expressly disagreeing with the majority conclusion that a demonstration of actual prejudice is required to dismiss an indictment under the supervisory power of the court. She opined that previous decisions of this Court and various federal courts of appeal specifically authorize district courts to exercise supervisory authority to dismiss an indictment to protect the integrity of the judicial process from, and to deter, prosecutorial misconduct. Finding the government attorneys' proven misconduct to be "outrageous,"

Judge Seymour stated that Judge Kane's decision should have been affirmed. [21] (A34-A41).

Thus, in all, of the five judges who have reviewed the facts, three of them—Circuit Judge Seymour and district court Judges Kane and Winner—have opined that the conduct by the Department of Justice attorneys was so egregious as to require dismissal to protect the integrity of the grand jury system. The other two judges—Circuit Judge Holloway and District Court Judge Bohanon—although not disputing the impropriety of the conduct, determined that dismissal was not appropriate absent a showing of prejudice which they did not find.

SUMMARY OF ARGUMENT

Traditionally, the courts, albeit in a limited fashion, have helped maintain a semblance of balance and independence in the grand jury institution by monitoring grand jury functions and sanctioning abuses of the grand jury process. In this case, the government seeks to further shrink the already minimal role of the federal courts in this process by asking this Court to deny federal district courts the use of their supervisory authority to correct prosecutorial abuses and to deter prosecutorial misconduct.

In emphasizing the importance of the investigative function of grand juries, federal courts have permitted a laxness of substantive and procedural practices that teeter upon converting the grand jury into a lawless body inextricably allied with the prosecution. Legal anomalies, which in other contexts have been deemed to pose unacceptable risks to fairness, have been created to ease the investigative function of the grand jury. Examples of such encroachments upon traditional concepts of due process permitted in the grand jury are: the use of hearsay evidence deemed too unreliable to introduce at trial (*Costello v. United States*, 350 U.S. 359 (1956)); the use of illegally seized evidence in derogation of society's privacy interests and its interest in deterring unlawful

[21] Judge Seymour also stated that, particularly with respect to the Bank, the majority's purported *de novo* review ignored the substantial prejudice caused by the purposeful presentation of false information and summaries. A34, n.1.

police conduct (*United States v. Calandra*, 414 U.S. 338, 351-52 (1974)); relevance standards that are so broad that both prejudicial and minimally probative evidence is regularly introduced (*Blair v. United States*, 250 U.S. 273, 282 (1919); *In re Pantojas*, 628 F.2d 701, 704 (1st Cir. 1980); *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978)); the use of leading questions that usually assures the prosecutor rather than the witness is testifying (*United States v. Weiss*, 752 F.2d 777, 788 (2d Cir.), *cert. denied* 474 U.S. 944 (1985); *United States v. Boberg*, 565 F.2d 1059, 1062-63 (8th Cir. 1977)); and the lack of access to, and review of, the grand jury record to determine whether sufficient evidence in fact supports an indictment and the exclusion of counsel for witnesses or targets subject to prolonged and detailed cross-examination (*see* Fed. R. Crim. P. 6).

These anomolies, and the prosecutorial practices that have evolved from them, have led to such domination and control over the grand jury by the prosecutor and have bred such universal disregard for the potential fairness of the process that the Chief Judge of the Court of Appeals of the State of New York has pronounced that the grand jury would indict "a ham sandwich" if so requested by a prosecutor. *See* Nat'l. Law Journal, Nov. 16, 1987, at p. 6, col. 1; *see also* M. Frankel & G. Naftalis, *The Grand Jury: An Institution on Trial* 21-28 (1977). Both public perception and actual experience indicates that the modern federal grand jury, although technically still an arm of the court, has evolved from its historically designed independent status, into a potentially abusive vassal of the prosecution.

The grand jury, however, has functions that transcend its duty to investigate. It also has the function of making public accusations of the most serious and irretrievable nature which, regardless of the ultimate outcome of the case, forever stigmatize and brand the accused. The very seriousness of the implications of such accusations as well as the extraordinary potential for prosecutorial abuse have led to the historical attempts to create a body independent of the executive to weigh the wisdom of instituting a charge. In this context, the erosion of the independence of the grand jury is serious and significant.

The government now suggests that dismissal of indictments be restricted to cases in which the defense can establish significant prejudice, knowing full well that grand jury secrecy and the probable cause standard governing grand jury indictment decisions make it exceedingly difficult to establish. Such a limitation will result (as it so far has in this case) in uncorrected abuse and misconduct, further erode the independence of the grand jury, and engender public disrespect for that part of the process designed to act as a "protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 342-43 (1974). It was to preserve the integrity of the administration of justice and address such situations that this Court has defined the inherent supervisory authority of the federal courts.

The instant case presents a perfect example of the importance of insuring that district courts maintain supervisory authority over prosecutorial misconduct before the grand jury. The record in the case demonstrates unequivocally that the misconduct herein was serious, flagrant, deliberate, and designed to secure an indictment against defendants unpopular with the prosecutors assigned to the case.

A highly unusual post-indictment incident, demonstrating the prosecutors' state of mind to court sanctions, graphically illustrates the need for judicial control through the exercise of the courts' supervisory authority and for a sanction sufficiently strong to deter this type of misconduct. When challenged as to why he violated the Bank defendant's *Massiah* rights (*Massiah* v. *United States*, 377 U.S. 201 (1964)), one prosecutor responded that among his reasons was that "no indictment has ever been dismissed because of [a Massiah violation]." [22] JA 89; *Kilpatrick II* at C31-C32. Until prosecutors fear the sanction there can be no curb for their abuse.

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[22] Shortly after the indictment's return, the prosecutor assigned to the trial deliberately violated the Bank's Sixth Amendment right to counsel by furtively interviewing the Bank's employees; acting as an investigator, the prosecutor also contacted school teachers of the eight and

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ARGUMENT

A DISTRICT COURT THAT FINDS WILLFUL, REPEATED, AND PERVASIVE MISCONDUCT BY GOVERNMENT ATTORNEYS BEFORE THE GRAND JURY MAY DISMISS AN INDICTMENT BEFORE TRIAL TO PROTECT THE INTEGRITY OF THE GRAND JURY PROCESS

By discovering the misconduct and purging it before trial, the district court here ensured that the federal court did not become an accomplice to the prosecutors' lawlessness, deterred future violations in this and other prosecutions, and guarded against the possibility that the grand jurors' indictment decision was tainted, while at the same time preserving the public's right to an indictment by an unbiased grand jury. The grand jury's history and the purpose behind the supervisory power of federal courts, demonstrate that the district court's action was appropriate and necessary.

In reversing the dismissal of an indictment returned after what the majority of the Tenth Circuit panel itself concluded was a presentation involving "unjustifiable" prosecutorial misconduct, the majority below has stripped the district courts of any realistic supervisory authority to remedy or deter deliberate misconduct by prosecutors seeking an indictment. Its decision has eradicated the check placed upon the prosecution by the courts to preserve the grand jury's vital independence.

A. Standards for Conduct By Prosecutors Before the Grand Jury Are Designed to Preserve the Historical Integrity and Independence of the Grand Jury

Transplanted from England, the grand jury was seen by our Founders as a bulwark for the individual against arbitrary or malevolent prosecution. *See generally Hurtado* v. *California*, 110 U.S. 516 (1884); M. Frankel & G. Naftalis, *supra* at 3. Because of their

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ten year old daughters of another Bank employee, set up a surveillance of the school, and then personally trailed the children home after school to interview their mother about her husband's whereabouts. *Kilpatrick II* at C31-C32.

acute awareness of the dangers associated with unchecked executive discretion and the indispensable need for fairness in the initiation of serious criminal prosecutions, the colonists included the grand jury among the rights assured by the Fifth Amendment.

To assist it in carrying out its investigative mandate, the grand jury is guided in its day to day activities by a prosecutor and has been given broad powers to operate free of the technical rules of evidence and procedure. The grand jury has wide ranging authority to inquire into suspected violations of the criminal law and, through nationwide service of process, to compel the production of documentary evidence or the testimony of witnesses, as it deems necessary. *See United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *see also Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972); *United States* v. *Dionisio*, 410 U.S. 1, 15 (1973); *Kastigar* v. *United States*, 406 U.S. 441, 443-44 (1972). The power of the federal grand jury, although extensive, depends upon and consequently reflects upon the authority and integrity of the federal court system. *See Brown* v. *United States*, 359 U.S. 41, 49 (1959); *Blair* v. *United States*, 250 U.S. 273, 282-83 (1919).

Because the grand jury is composed of laymen, the access and function of the prosecutor has enabled the executive to dominate and control the grand jury's awesome power. This dominance gives rise to significant potential for abuse. *See* M. Frankel & G. Naftalis, *supra* at 52-59. Against this backdrop of the potential for abuse and manipulation, the standards for conduct before the grand jury, including Rule 6, have been developed and heretofore have been enforced by the courts to ensure that the grand jury continues to fulfill its invaluable function as a "security . . .against hasty, malicious and oppressive prosecution." *See Wood* v. *Georgia*, 370 U.S. 375, 390 (1962); *see also, United States* v. *Mechanik*, 475 U.S. 66, 73 (1986) (O'Connor, J., concurring) (grand jury rules designed by Supreme Court and Congress are intended to ensure integrity of the grand jury.)

This Court has repeatedly emphasized that if it is to serve both of its functions the grand jury must not be subject to abuse. *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 432-35 (1983); *see also, Beck* v. *Washington*, 369 U.S. 541, 580 (1962) (Douglas, J.

dissenting); *United States* v. *Dionisio*, 410 U.S. 1, 12 (1973) ("[T]he constitution could not tolerate the transformation of the grand jury into an instrument of oppression."). In the face of its close working relationship with prosecutors, the grand jury's independence and fairness can be maintained only by vigilant supervision by this Court and the lower federal courts to ensure that the grand jury's accusatory function is not abused. *See United States* v. *Calandra*, 414 U.S. 338, 346 n.4 (1974); *Blair* v. *United States*, 250 U.S. 273, 280 (1919); *see also*, *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972); *Hale* v. *Henkel*, 201 U.S. 43, 65, (1906) ("doubtless abuses of [the grand jury's investigative] power may be imagined, . . .[b]ut were such abuses called to the attention of the court, it would doubtless be alert to repress them.") [23]

In this case, the district court found that overzealous prosecutors, under the cover of grand jury secrecy, engaged in conduct deliberately designed to usurp the grand jury's accusatorial function. The majority of the panel did not find otherwise. The plethora of abuses consistently engaged in throughout the prolonged investigation as documented in the district court's opinion were facilitated by prosecutorial access and control. These abuses had

[23] However, the practical power that prosecutors wield before the grand jury has engendered concern as to whether the courts have been sufficiently vigilant and has led to calls for reform. For instance, the House Delegates of the American Bar Association has endorsed a set of grand jury standards proposing extensive guidelines. ABA Grand Jury Policy and Model Act (1982). These proposals were cited with approval in *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1374 (6th Cir. 1978), *cert. denied*, 440 U.S. 934 (1979) (Weick, J., dissenting). In addition, legislation based in part on the ABA reforms, has been introduced in the United States House of Representatives to effect a major overhaul of the grand jury system. H. R. 1407, 99th Cong., 1st Sess. (1985); *see also Grand Jury Reform, 1985-86: Hearings on H. R. 1407 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2nd Sess. (1985-1986); U.S. Comptroller Gen., Report to Cong., *"More Guidance and Supervision Needed Over Federal Grand Jury Proceedings"* (Oct. 16, 1980); *Oversight of IRS and Justice Department Prosecution of Several Tax Cases, 1986: Hearing Before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 26-31 (June 23, 1986).

an impact upon all phases of the grand jury proceeding. The grand jury was denied its traditionally unfettered power to assess the credibility of witnesses by the prosecutors misleading them as to the status of the IRS agents who testified, by the prosecutors' browbeating and harassment of witnesses for the defense, and by the prosecutors' concealment of their manipulation of informal immunity grants to control the substance of the testimony. In addition, the misconduct infected the grand jury decision-making authority as false evidence was used to justify the indictment of the Bank and false inferences were suggested in the questioning of witnesses who invoked their Fifth Amendment privilege.

In light of the pervasiveness of the misconduct, the failure to fashion a remedy to cope with it now and in the future would constitute an abdication of the federal court's role to administer justice fairly and reasonably. Although a certain degree of latitude and deference to the grand jury's investigative function may be acceptable, and certain technical errors may be rendered harmless by a decision of a petit jury, see *United States* v. *Mechanik*, 475 U.S. 66 (1986), this Court has never suggested a standard of complete judicial disregard of prosecutors' blatant violations of rules of conduct and purposeful attempts at overreaching. Such judicial abstinence would, of course, further ensure a grand jury that is little more than a prosecutors' rubber stamp and, potentially, their oppressive tool. Indeed, this Court has observed that:

> Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance.

United States v. *Johnson*, 319 U.S. 503, 507 (1943).

B. The District Court's Exercise of its Supervisory Power By Dismissing the Indictment Prior to Trial was Essential to Uphold the Integrity and Fairness of the Grand Jury System

This Court has long recognized that the judicial supervision of the administration of criminal justice by federal courts is essential to "establishing and maintaining civilized standards of

procedure and evidence." *McNabb* v. *United States*, 318 U.S. 332, 340 (1943). The exercise of a court's supervisory power is particularly vital in preventing "flagrant disregard" of federal rules of procedure and in deterring improper conduct before grand juries. *Id.* at 345; *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); *United States* v. *Calandra*, 414 U.S. 338, 346 n.4 (1974); *Mallory* v. *United States*, 354 U.S. 449 (1957); *Ballard* v. *United States*, 329 U.S. 187 (1946); *see also Hale* v. *Henkel*, 201 U.S. 43 (1906). In exercising supervisory power to remedy misconduct during the investigative phase, this Court has expressly observed that a definitive demonstration of actual prejudice to the defendant is not determinative. Rather, such misconduct, mandates dismissal pursuant to supervisory power because "[t]he injury is not limited to the defendant . . . there is injury to the [grand and petit] jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. at 195. [24]

Justice Brandeis recognized sixty years ago that to permit prosecutors to prevail in the face of their illegal activity is to ratify misconduct. In such instances, federal courts must withhold their offices "to maintain respect for law . . . to promote confidence in the administration of justice . . . to preserve the judicial process from contamination." *Olmstead* v. *United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

In *United States* v. *Hasting*, 461 U.S. 499 (1983), this Court set forth the three purposes underlying the use of supervisory powers:

> (1) to implement a remedy for violation of recognized rights;
>
> (2) to preserve judicial integrity; and
>
> (3) to deter illegal conduct.

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[24] Of course, if there was demonstrated prejudice to a known right, dismissal would be required pursuant to the due process clause. The concept and need for the supervisory power of federal courts exists when demonstration of specific prejudice may be lacking. *See* A39 (Seymour, J., dissenting).

Hasting also established that in each case those goals must be balanced against society's interest in the prompt administration of justice and the legitimate interests of the victim.

In this case, as noted by the dissent below (A40-A41), that same balancing analysis supports the district court's dismissal. The dismissal order by the district court here was carefully tailored to accomplish the underlying purposes of the court's supervisory power while not interfering with society's need for enforcement of its criminal laws. [25]

The misconduct is not technical in nature; it is purposeful, outrageous, pervasive, and systematic. There has been no trial, and the dismissal order specifically permits the prosecution to seek an untainted indictment. *See Ballard* v. *United States*, 329 U.S. 187, 196 (1946). Moreover, this is not a case involving trauma to any victims.

In addition, unlike suppression, which deflects the truth-finding process, *see United States* v. *Payner*, 447 U.S. 727, 734 (1980); *Stone* v. *Powell*, 428 U.S. 465, 490 (1976), dismissal with the right properly to re-indict enhances the truth-finding process by guaranteeing that the decision to indict is made by grand jurors without threatened prejudice. *See Ballard* v. *United States*, 329 U.S. 187 (1946).

A dismissal in this case will involve minimal delay in view of the government's ability to present hearsay evidence in *accurate* summary form. In this context it should be recalled that the bulk of the evidence against the Bank and Monte Smith was presented at trial on a single day. Indeed, any delay in bringing this case to

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[25] Indeed, the government itself suggested that such a remedy was appropriate for the limited violation of Rule 6(d) that occurred in *United States* v. *Mechanik*, 475 U.S. 66 (1986). In its petition for a writ of certiorari, the government took the position that:

> "the most specific and tailored remedy would be to require the government to correct the error—that is, to present its case anew to a grand jury in compliance with Rule 6(d)—but not to reverse a fair and untainted conviction if a procedurally regular indictment is obtained."

Petition in *United States* v. *Mechanik* at 14 n. 9.

trial[26] thus far has been caused by the prosecutors' determination, for whatever reason, to appeal the dismissal rather than to present the case to an untainted grand jury for its review. The pre-trial dismissal sanction employed here does not infringe in any significant manner on society's interest in the administration of criminal justice.

On the other hand, the purposes underlying the courts' exercise of supervisory powers weigh heavily in favor of dismissal as ordered by the district court. Dismissal implements the essential rules established by Congress and this Court for the administration of proceedings before federal grand juries; preserves judicial integrity; and deters "outrageous" abuse such as that seen here.

The Constitution guarantees a grand jury the function of which is to protect as well as to indict. Because the grand jury process is *ex parte* and cloaked in secrecy, prosecutorial abuse is rarely discovered. When an abuse occurs, but is not discovered until or after trial, the *Mechanik* opinion effectively eliminates a district court's ability to sanction it. [27] Unless the district courts' supervisory function and authority over the grand jury process is to be totally negated and the governing rules rendered dead letters or pretend rules, district courts must be authorized to dismiss an indictment when serious and purposeful grand jury

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[26] The Bank at its arraignment moved for an immediate trial and agreed to forego pretrial motions if it could be tried immediately. The prosecution opposed the Bank's motion and it was not granted.

[27] The pretrial dismissal here with the right to replead is consistent with this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986). This Court's refusal in *Mechanik* to dismiss an indictment because of a technical violation of Rule 6(d) is predicated upon a holding that the petit jury's verdict of guilty demonstrated *a fortiori* that there was probable cause to charge the defendants with the offenses. Although not specifically addressing the supervisory role of the courts, this Court stated that the societal cost of a retrial was a primary consideration in its decision and further observed that "there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial." *United States* v. *Mechanik*, 475 U.S. at 71.

misconduct is discovered before trial.[28] *Cf. McCarthy v. United States*, 394 U.S. 459 (1969) (failure to comply with procedure of Fed. R. Crim. P. 11 deprives defendant of procedural safeguards and requires that defendant be permitted to plead again).

Furthermore, dismissal comports with the *Hasting* standard as it preserves judicial integrity. The majority below did not dispute the district court's finding that the grand jury presentation was riddled with purposeful, "unjustifiable" misconduct or that the prosecutors' motives were to prejudice the grand jury against the defendants. Requiring the district court, which itself uncovered many of the blatant violations by the prosecutors, to proceed to try defendants on an indictment founded upon such misconduct is tantamount to forcing the district court to be an accomplice in the prosecutors' willful disobedience of law.

Inasmuch as the grand jury derives its integrity and authority from its status as "an appendage of the court" (*Brown* v. *United*

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[28] There is no doubt that Congress intended that the dismissal sanction be employed in appropriate situations for misconduct before the grand jury. Congress, like this Court, has confirmed that federal courts after a review of grand jury transcripts may "dismiss the indictment because of matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(3)(C) (ii). *See United States* v. *Mechanik*, 475 U.S. 66 (O'Connor, J., concurring). By including this provision, the Advisory Committee on the Federal Rules of Criminal Procedure intended to continue the practice of providing the defendant a right to "attack the indictment" when it was "obtained in violation of law." *Proposed Rules of Federal Criminal Procedures: Hearings Before the Advisory Comm. on Rules of Criminal Procedure*, Sept. 9, 1941 at p. 302. The Committee understood that such a motion to dismiss could be, among other reasons, for "irregular proceedings and [the presence in the grand jury of] unauthorized persons and bullying by the district attorney." *Id. See also, id.* at p. 474 (Mr. Medalie commenting that "bullying by the district attorney" is an "irregularity of procedure"); and *Id.* on Feb. 19, 1943 at pp. 550-551 (Mr. Medalie noting that the presence of an unauthorized person in the grand jury is an appropriate ground for dismissal). The Committee chose not to list each potential basis for dismissal in the Rules for fear of a mistaken omission and instead opted to permit the motion to cover "everything you can think of that gives the defendant a chance to object to the indictment." *Id.* at p. 305.

States, 359 U.S. 41, 49 (1959)), the district court here was in the best position to judge the impact of the prosecutors' behavior on the integrity of the grand jury and court system and the need for the sanction it imposed. *See Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 564 (1983) (Chief Judge of large metropolitan district uniquely familiar with problems associated with supervision of the conduct of grand juries). The district court judges who undertook a meticulous review of the prosecutors' numerous acts of misconduct in this case—some of which were brought to the district court's attention by observers, not litigants—were in the best position to assess the remedy appropriate for the pervasive misconduct. They determined that dismissal was required to uphold the integrity of the operation of the court and grand jury system.

Dismissal is likewise required to deter future illegal conduct, the final purpose behind the exercise of supervisory power. The prosecutors' misdeeds here are widely known. [29] Dismissal will send the strong message that despite the *ex parte* role and cover of secrecy prosecutors enjoy in the grand jury, appropriate standards of conduct must be maintained. Denying dismissal will encourage prosecutorial recklessness before grand juries because it will establish that there is no significant sanction to be suffered.

Remedies other than dismissal simply are not effective in dealing with the problem of purposeful and pervasive misconduct by prosecutors before grand juries when discovered. The contempt power available for violations of Rule 6 is rarely invoked[30], and few, if any, instances can be demonstrated where the Department of Justice itself has uncovered grand jury misconduct and disciplined its own attorneys.[31] Indeed, in the instant case, despite the fact that all five judges who have reviewed the prosecutors' presentation determined that purposeful and "unjustifiable" misconduct occurred, the Department of Justice has declined to discipline the offending attorneys and has publicly defended the conduct. *See, e.g., Oversight of IRS and Justice Department Prosecution of Several Tax Cases: Hearing Before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 96 (June 23, 1986) (Testimony of Roger M. Olsen, Assistant Attorney General, Tax Division, Dep't. of Justice) (asserting that the prosecutors here who violated Rule 6(c) by personally administering oaths to the office "agents of the grand jury" should be "applauded"). The government even attempted to remove from the pages of the nation's law books an opinion critical of the prosecutors.

[29] The first publicity of the prosecutors' misconduct was generated by the prosecutors themselves. Their efforts at prior restraint of the publication of Judge Winner's opinion, as should have been anticipated by them, were met with overwhelming negative reaction by the media and civil liberties groups. The press immediately published much of the text of Judge Winner's opinion in major national newspapers. *See, e.g.*, N.Y. Times, Jan. 22, 1984, at 24, col . 3.

[30] Indeed, research has revealed no reported decision where a prosecutor was sanctioned for contempt under Rule 6(e). *See also Grand Jury Reform*, 1985-86: *Hearings on H.R. 1407 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary* (1985-1986), 99th Cong., 1st & 2d Sess. 324.

C. The Tenth Circuit's Standard Renders Meaningless the Applicable Rules of Conduct and Undermines the Vital Purposes Behind Grand Jury Secrecy

As this Court has recognized, because of grand jury secrecy, an actual determination of the effect of a flawed indictment presentation is rarely possible. *Cf. Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (difficulty in assessing effect of discrimination of grand juror selection process mandates rule of mandatory dismissal); *see also Ballard* v. *United States*, 329 U.S. 187, 196 (1946) ("a properly constituted grand jury may or may not return new indictments"). Indeed, the prosecutors in this case have contended that any meaningful inquiry into the existence of prejudice before the grand jury by examining those grand jurors would itself endanger the vital functions and integrity of that body. Moreover, a demonstration of prejudice as required by the majority below simply is

[31] *See Oversight of Internal Revenue Service and Justice Department Prosecution of Several Tax Cases, 1986: Hearings Before the Subcomm. on Oversight of the Internal Revenue Service of the Comm. on Finance*, 99th Cong., 2d Sess. 114 (June 23, 1986) (Exchange between Senator Armstrong and Roger M. Olsen, Assistant Attorney General, Tax Division, Department of Justice) (Information concerning Department of Justice sanctions of government attorneys is not public.)

not determinative when a court exercises its supervisory power to maintain the integrity of the judicial system.

This Court's decision in *Young* confirms that prejudice is not required when a court exercises supervisory power to correct an error that "undermines confidence in the integrity of the criminal proceeding." *Young* v. *United States*, _ U.S. _ 107 S.Ct. 2124, 2139 (1987). There, this Court held that the mere appearance of bias by an interested special prosecutor was grounds for reversal of a conviction. In reaching that conclusion, this Court focused not on actual prejudice but on the strong possibility of prejudice.

Here, the threatened prejudice is at least as strong as that in *Young*. The prosecutors deliberately attempted to prejudice the grand jurors in this case. The district court did all it reasonably could, short of intruding on the grand jurors' deliberations by taking their testimony, to determine if the prosecutors actually had succeeded in prejudicing the defendants.[32] Indeed, the government itself successfully opposed a defense motion to interview the grand jurors in this case, by objecting that the process would be "cumbersome" and would create "substantial inhibition on the willingness of citizens to serve as grand jurors and, if they do, to deliberate freely." *See* note 7, *supra*.[33] Although the majority of the Tenth Circuit disagreed with the district court's well-reasoned conclusion that a showing of prejudice was "convincingly made"

[32] The difficulty in establishing actual prejudice upon the grand jury is exemplified in this case. After seventeen days of hearings at which the prosecutors, IRS agents, grand jury witnesses and others testified and after a review of the entire grand jury transcript, the district court found that the defendants had been prejudiced by the misconduct. Upon a *de novo* review the majority of the Tenth Circuit panel, although not disputing that prejudice to the targets was the goal of the prosecutors' "unjustifiable" misconduct, disagreed with the district court's conclusion that prejudice had actually been demonstrated.

[33] Because of the important secrecy considerations applicable to grand jury proceedings, courts understandably have been reluctant to probe the psychological effects of prosecutors' misconduct upon grand jurors. Thus, one court has observed in language equally applicable here:

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(*Kilpatrick II* at C43), it did not dispute that the misconduct was rife with the possibility of prejudice. Thus, the reasoning of *Young* and *Vasquez* suggests that dismissal is necessary to guard against the likelihood that prosecutors, by their purposeful misconduct, succeeded in their unrefuted goal of usurping the grand jury's accusatory function. *See also United States* v. *Mechanik*, 475 U.S. 66, 78 (O'Connor, J., concurring) (dismissal is appropriate even after trial where there is "grave doubt" that misconduct affected the grand jurors' deliberative process).

The rules violated by the prosecutors here are the very rules established by this Court and Congress to avoid prejudice to potential targets and to the grand jury system. Prejudice inheres in the prosecutors' failure to follow these simple dictates which were designed to eliminate the need for subsequent subjective inquiry and fact-finding as to the effect of prohibited activity on the defendant and on the administration of criminal justice. *Cf. McCarthy* v. *United States*, 394 U.S. 459, 471 (1969) ("[P]rejudice inheres in a failure to comply with Rule 11 for non-compliance deprives the defendant of the Rule's procedural safeguards. . . .").

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> The prospect of peering into the grand jurors' minds, or of examining them individually, . . . is both impractical and unpalatable. To so defile the secrecy of the grand jury process is to compound the problem the Government has created, rather than to alleviate it. The alternative of convening a grand jury distinct from that which heard the [subject] testimony is not so onerous as to justify the jeopardizing of a defendant's Fifth Amendment rights. To hold otherwise is to permit intrusion into the long-approved common law secrecy of the grand jury process.

United States v. *Hinton*, 543 F.2d 1002, 1010 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976) (footnote omitted). In the event this Court determines that examination of grand jurors is appropriate, the case should be remanded to the district court with appropriate directions. Below, the government suggested the case should be remanded if a full determination of prejudice could not be made on the current record. Brief for the Appellant at 47, n.23, Case Nos. 84-2481 to 84-2487, May 1, 1985.

The requirement by the majority of the panel below that defendants demonstrate the certainty of prejudice before dismissal is ordered reduces the Federal Rules of Criminal Procedure to dead letters. Although limited technical or unintentional deviations from the rules may be subject to a harmless error analysis, when, as here, the violations are various, pervasive, and purposeful, a harmless error analysis realistically cannot be indulged without converting the Federal Rules of Criminal Procedure into a mere intellectual exercise.

When grand juries function properly, they play a crucial role in the fair administration of criminal justice. This Court must delegate to the district courts supervisory authority at least adequate to continue to maintain the integrity, independence, and impartiality of this essential body.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: February 25, 1988

Respectfully submitted,

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